

2005-0753

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

HILLSBOROUGH, SS.  
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,  
THOMAS M. BURKE, MARIE I. BURKE,  
AND BERNADINE P. DONELSON

ORDER

The Petitioner, Edward J. Burke ("Edward"), brings this action against his mother, Marie I. Burke ("Marie"), his two siblings, Thomas M. Burke ("Thomas") and Bernadine P. Donelson ("Bernadine"), and Bunny's Superette, Inc. ("Bunny's"), seeking broad relief in connection with rights and interests he claims under a purported oral agreement. Edward avers that many years ago, when he and his siblings still lived with their parents, a verbal agreement or understanding was reached among all concerned family members that all family members would equally own the family business and other accumulated property. In this regard, Edward asserts that, under this agreement, with the death of the two parents, the siblings would come to equally own said assets. Edward further avers that this original oral agreement or understanding was reaffirmed by the individual respondents upon the death of his father, Bernard Burke ("Bernard"), in

1971, that he fulfilled his obligations under the agreement and fully relied on it, and that the individual respondents have taken actions since about 1999 to wrongfully deprive him of his contract-based rights. In this regard, Edward particularly challenges: (1) Marie's creation of a will and revocable trust in 1999 and her conveyance of certain property into the trust; (2) Marie's later trust-related actions in 2004 to further limit his claimed property entitlements, including her conveyance, through the trust, of both stock in Bunny's and certain real properties to Thomas; and (3) Bernadine's conveyance of her stock in Bunny's to Thomas in 2004 at about the same time her mother conveyed hers through the trust. Edward also asserts that Thomas has been guilty of exerting undue influence over Marie to have her take action against him, that he has violated a claimed "fiduciary duty of a de facto attorney," and that he has violated the Uniform Fraudulent Transfer Act, RSA Chapter 545-A. Finally, he claims that Thomas is proceeding, or has proceeded, particularly through corporate special meetings relative to Bunny's, in ways which are contrary to, and violative of, his contract-based rights.

The individual respondents vigorously oppose Edward's contentions. They assert that no oral agreement, as suggested by Edward, was ever in place, and they contend, among other things, that they have acted properly and within their rights relative to pertinent inheritance and property interests herein.

The Respondent, Bunny's, also opposes Edward's case, and has also interposed a counterclaim, contending that Edward has failed to repay certain indebtedness due the corporation.

A trial occurred over two days - - June 15 and June 16, 2005. During the trial, the Court received testimony from several witnesses, either live or through videotaped deposition, and also received a number of exhibits into evidence. The Court, thereafter, was also provided post-trial memoranda.

Upon consideration of the pertinent evidence, and the arguments presented, the Court finds and rules as follows.

### **I Background**

Bernard, with his wife Marie, established a food business in the early 1950's. The principal food market, known as Bunny's Superette, came to be located on Webster Street, Manchester, New Hampshire. When the food business began, the three children, Bernadine, Edward and Thomas were, respectively, about 12, 10 and 6 years of age. The business was unquestionably considered a family business, and the Burke siblings worked in it throughout their childhood without pay. Nonetheless, their parents retained full control (legal and otherwise) of the business. They made all pertinent decisions, and retained full control of business finances and operations. The children were provided with all necessities and were given spending money and use of the family vehicle or vehicles. They had friends, engaged in sports and extracurricular activities, and were encouraged by their parents to go to college after high school.

After graduation from high school, all of the siblings continued, at least for a time, to work in the family food business, either part time or full time. However, only Edward continued without interruption to work in the business.

Both Bernadine and Thomas attended college, and received financial support from their parents. Bernadine went on to, among other things, teach for several years, and to marry. She did not return to work at the family food store except on a sporadic basis. Thomas, for his part, went into the military after college where he served for several years. He came to return to work in New Hampshire in the late 1960's, and came to return to work in the family food business. When he did this, he received from his parents a salary for his work.

As stated previously, Edward remained in the family business and did not go to college. He continued to work particularly with his father and continued to work for a time with no salary. During this period, however, his parents paid for his living expenses, provided him spending money, and gave him use of the family vehicle or vehicles. Moreover, when the Petitioner married in about 1966, he moved out of his parents' home and came to receive a salary for his work efforts.

There is no question that Edward worked hard and constructively in the family business. He was deeply attached to his father. Indeed, at trial he testified that the time working with his father were "the best years of his life." Certainly, as well, Edward considered himself to be an important contributor to the family business. Nevertheless, and whatever his subjective views were in this regard, Edward has here failed to show that any contract or understanding agreed to by all concerned (including his mother) was ever entered into so that he and his siblings were afforded some enforceable form of ownership interest in the family business and in the other properties owned by their parents. To the

contrary, the evidence shows that Bernard retained strong control over the family business and related properties so long as he lived, and particularly worked in partnership with his wife, Marie, in so doing. In this connection, it was Bernard, over some objection from Edward, that determined that Thomas should be allowed to return to the family business in the late 1960's when Thomas left the military.

It is true that Edward came to be very much involved in the business's financial affairs, even while his father was alive, and also played a significant role in business operations, expansion initiatives, and construction activities. It is also true that, as time went on, both Marie and Bernadine became increasingly less involved in actual business operations, and Edward (and also Thomas) took on increasing responsibility. Nonetheless, and particularly in the case of Edward, it has not been shown that he continued to work in the business because of any enforceable promise or guarantee of part ownership. Rather, the Court finds that Edward stayed in the business, worked therein, and dealt as well with other property owned by his parents, because he was attached to the business and to his father, and not because of any real or enforceable agreements or guarantees of ownership.

In or about 1970, Bernard became ill and died on May 12, 1971. He left a will that provided each of his children with only one dollar, and gave the rest of his estate fully to his wife, Marie. See T. Burke Ex. A. In addition, and as the surviving joint tenant, Marie became sole owner of certain real and other properties which had been purchased or obtained during the marriage and which

were still possessed when Bernard died. These included real property in Manchester located at 121 Arah Street, 18 Rockland Avenue, 68 Webster Street, 77 Webster Street, and 753 Pine Street.

Edward never contested or challenged his father's will, although it did not recognize or confirm any purported "equal ownership" agreement. Nor did he take at that time any other action challenging his mother's property interests. Instead, he worked with his mother and siblings, and with the family's trusted lawyer, Charles Dunn, Esq., to create a corporation to operate, in the future, the family business. This corporation, (Bunny's) was established with Marie and the children each having a 25% ownership interest. However, in connection with other remaining properties, Marie retained full ownership.

Edward asserts that at or about this time the family members all reaffirmed the prior "equal ownership" agreement. He points to the "equal ownership" status set up as to the corporation, and avers that the real property and other property that his mother inherited were kept in his mother's name only for tax and income reasons. The Court finds otherwise.

The Court finds that in allowing the establishment of a corporation for the family business, Marie agreed to provide, or allow, a 25% ownership interest to each of her children and to retain that same percentage interest for herself. She did this not because of any prior agreement or understanding as to "equal ownership", but principally because at that time, and with her husband's death, this action recognized her children's contributions to the business, and, most significantly, effectively worked to keep her sons fully involved in the business.

The ownership arrangement appears to have been first suggested to Marie by Bernadine. At the same time, Marie retained full ownership of all other properties.

As part of the incorporation process, Edward, along with his mother and two siblings, entered into a stock restriction agreement which provides:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the "agreed price" . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holders [sic] and the said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

See Exhibit B to the Petition for Injunction.

The above-cited stock restriction is the only one that was put in place to limit a shareholder's right to transfer stock holdings. No stock restriction agreement was put in place to prohibit or hinder a shareholder from gifting his/her stock interests.

After the business's incorporation, Edward and Thomas operated and managed Bunny's for many years, indeed until early 1996. The two brothers worked to expand operations, and purchased and/or owned stores outside of Manchester. Edward and Thomas set their salaries, and each took the same salary. The profitability of their business operations fluctuated: some years (e.g. between 1980 to 1985) the business was quite successful, and the brothers each earned incomes in the \$60,000 to \$80,000 range. In other years, however, (e.g. 1993 to 1995) their business operations did less well and each, as a

consequence, earned less income (i.e. in the \$30,000 to \$40,000 range). See T. Burke Ex. B.

In the meantime, the brothers, (and increasingly Thomas by himself over time) managed their mother's real estate and other holdings. Rental and other income, or revenues attributable to said holdings (or their sale), were maintained in accounts for her; her needs were covered or provided for through said accounts; and she even received in some years a salary from the business -- as did Bernadine. Nonetheless, Marie maintained complete ownership of her properties and never agreed (until recently) to part with any such ownership. Indeed, with the sale of certain real properties in 1987, that is, those located at 100 Webster Street and 18 Rockland Avenue, she retained all sale proceeds even though Edward requested at that time that he be given a portion of the proceeds.

Over the years, Edward's relationship with his mother and his siblings worsened. In February, 1996, he abruptly left his actual work situation at Bunny's and went to work at another family/grocery business in Manchester, Jon O's Market, Inc., a business involving one of his sons. Edward claims that he left his work at Bunny's because he caught Thomas stealing some cash proceeds. The evidence suggests, however, that the problems between the brothers were of a broader nature, and, to some degree, involved Edward's increased involvement, prior to his departure, with the Jon O's Market, Inc. business.

At the time he ceased working at Bunny's, Edward owed the Company monies because of past shareholder loans. Although he has made some



payments in that regard, Edward continued to owe, with accrued interest, the sum of \$35,207.87 as of about the time the Company asserted its counterclaim herein. To be sure, in some past years the brothers were able to fully cover loans they had taken by later bonuses. This, however, was not always possible, and Edward's outstanding indebtedness was not subject to such bonus coverage.

From early 1996 onward, Edward, his wife, his children, and his grandchildren had almost no contact with Marie or Thomas or Bernadine. Indeed, Marie has never met Edward's grandchildren and has not had any real contact with his children since they were very young.

In 1999, Marie created a will and revocable trust, to provide for the distribution of her estate at her death. In these documents, she did not treat her children equally. Her stock in Bunny's and her property interests in related business real estate were slated to go to Thomas upon her death. See Pl.'s Exs. 1 and 4.

In March, 2004, Marie, in her capacity as trustee of the Marie I. Burke Revocable Trust, conveyed certain real properties associated with Bunny's to Thomas. See T. Burke Ex. G; Pl.'s Ex. 6. Said properties, and her stock in Bunny's, had earlier been transferred to the Trust. Then, in April, 2004, Marie, again through her trust, and Bernadine, individually, both conveyed their entire stock interests in Bunny's to Thomas. See e.g. Pl.'s Exs. 7 and 20.

Thomas gave no money or other consideration for these conveyances either to Marie (or her Trust) or Bernadine. At about the time the conveyances

were effectuated, Marie amended her trust, changing the dispositions for her children and others. Among other things, Marie amended the Trust to change her disposition, upon her death, to Edward. See Pl.'s Ex. 2.

After Edward instituted this present action, Marie made further amendments to her trust documents to eliminate any disposition to Edward. See Pl.'s Ex. 30. She then later further amended the trust in September 2004 to create a residuary trust for Bernadine. See Pl.'s Ex. 3.

Once he obtained from his mother and Bernadine their stock in Bunny's, Thomas took actions to change the composition of Bunny's Board of Directors and otherwise consolidate his control over the business.

## II. Discussion

In order to establish an oral agreement or understanding of the nature suggested by the Petitioner, he is required to establish its existence by clear and convincing evidence. See Tsiatsios v. Tsiatsios, 140 N. H. 173, 176 (1995); Shaka v. Shaka, 120 N. H. 780, 782 (1982). This he has failed to do. Rather, the evidence supports the conclusion that no such "equal ownership" agreement was ever reached. Moreover, while Edward worked many good years in the family business, he obtained substantial benefits for his efforts.

Edward, however, also argues that the transfers of Bunny's stock that Marie (through her trust) and Bernadine, individually, made to Thomas in the spring of 2004 were not gifts but "sales" within the meaning of the pertinent stock restriction agreement. In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie.

The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie's revocable trust, and with wills. See RSA 547:3 I. (a) and (c) (Supp. 2004); RSA 498:1 (1997 & Supp.2004). The Court thus declines to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence.

However, and insofar as the Court has jurisdiction herein, it finds and rules that no conveyances of Bunny's stock in April, 2004 have here been shown to have been a form of "sale" under the stock restriction agreement. As to Bernadine's stock conveyance at that time, it has not been established that it involved any consideration provided by, or created by, Thomas. The Court finds that while Bernadine determined to make the stock conveyance after she discussed the matter with both Marie and Thomas, she did so not because she received anything of value from Thomas, but because she felt it best for all concerned. Bernadine trusts and believes in both Marie and Thomas -- who both have long-standing and good relations with her. While Marie did make revocable provisions for Bernadine in her trust, the Court does not find that these somehow constitute consideration from Thomas for Bernadine's conveyance of her stock to him.

Nor does the Court find in this case any basis to provide Edward any relief in connection with special meetings or corporate action that Thomas has recently initiated or taken after he obtained the stock conveyances.

Accordingly, the Court finds and rules that Edward has failed to establish entitlement to any of the relief he seeks.

Turning now to Bunny's counterclaim, the Court finds and rules that Edward owes Bunny's the sum of \$35,207.87 to the date the counterclaim was instituted. See in particular Bunny's Ex. K. Contrary to Edward's contentions, the Court finds that there was no proper ability, by virtue of corporate earnings in the last fiscal year Edward actually worked at Bunny's, to reduce Edward's debt through bonuses, and that "loans to stockholders" were not repaid each year.

In sum, the Court rules in favor of the Respondents in connection with Edward's claims for relief insofar as these are properly presented, and otherwise dismisses said claims for lack of jurisdiction. With respect to the counterclaim of Bunny's, the Court enters judgment in favor of said Corporation, and as against Edward, in the amount of \$35,207.87.

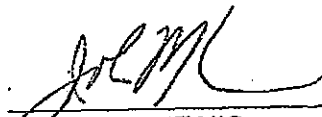
The parties have advanced claims for attorney's fees in this matter. The Court declines to award any attorney's fees herein. In connection with the Respondents' assertions that Edward has here acted in bad faith, the Court makes no such finding.

Certain parties have filed requests for findings of fact and rulings of law. Insofar as any such proposed findings and rulings are consistent with this Order they are **GRANTED**; otherwise they are **DENIED**.

SO ORDERED.

Date

8/23/05

  
JOHN M. LEWIS,  
Presiding Justice

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

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ORDER

The petitioner, Edward J. Burke, has filed a Motion to Set Aside, Modify and/or Reconsider Decree dated August 23, 2005. Upon consideration, the Court DENIES the petitioner's motion.

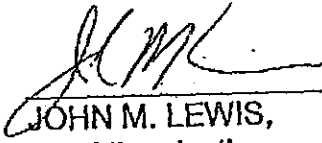
In so doing, the Court first observes that the trust of Marie I. Burke is plainly an "express trust" within the meaning of RSA 564-A:1, I. Second, the Probate Court has "exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547 . . . ." RSA 498:1; See also RSA 547:3-b, and RSA 547:3, I (a), (c) and (d). The petitioner misstates the law when he asserts that "[t]he law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies." See Pl.'s Response to Resp., Thomas M. Burke's Supplemental Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree, dated September 21, 2005 at 1.

Third, the Superior Court subject matter jurisdiction restraints require that this Court not pass on those issues that directly pertain to the trust of Marie I. Burke. The Court clarifies that it makes no rulings as to, for example, the petitioner's challenge to the transfer of stock (through the trust) to Thomas M. Burke from Marie I. Burke as trustee, or as to his challenge to the deeding through the trust to Thomas M. Burke of certain real property associated with Bunny's Superette.<sup>1</sup> Fourth, the parties' failure to raise the subject matter jurisdiction limitation of this Court during the trial does not somehow provide this Court with proper subject matter jurisdiction. Finally, any party here remains able to initiate appropriate proceedings in the Probate Court as to matters or issues within that Court's subject matter jurisdiction.

SO ORDERED.

Date

9/28/05

  
JOHN M. LEWIS,  
Presiding Justice

<sup>1</sup> The Court notes that its findings relative to Marie I. Burke's will and trust, as set forth on pages 9-10 of its Order dated August 23, 2005, do no more than track the undisputed chronology of the will/trust executions Marie I. Burke entered. Further, the Court withdraws the finding that "Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernadine." This specific finding goes beyond the Court's subject matter jurisdiction insofar as it directly deals with Marie I. Burke's trust-related actions, and is unnecessary in connection with the Court's treatment of Bernadine P. Donelson's stock conveyance.